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FILED
FEB 12 1941
CHARLES ELMORE CROPLEY
CLERK

TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1940

No. 760

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

NO. 9463

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:
F. DAVID MANNOCCIR, II, Esq.,

For Respondent:
HARRY R. HORROW, Esq.,
E. M. WOOLF, Esq.,

Docket No. 86438

ALBERT K. MILLER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES:

1936

Sept. 5—Petition received and filed. Taxpayer notified.

Sept. 8—Copy of petition served on General Counsel.

Oct. 28—Answer filed by General Counsel.

Nov. 2—Copy of answer served on taxpayer.

Dec. 7—Order to show cause on or before Dec. 30, 1936, entered (Fee case).

Dec. 28—Fee paid.

1938

Aug. 5—Hearing set Sept. 26, 1938 in San Francisco, California.

1938

Sept.29—Hearing had before Miss Harron on merits. Submitted. Stipulation of facts filed. Petitioner's brief due Oct. 29, 1938. Respondent's brief due 11/29/38. Reply due 12/14/38.

Oct. 14—Transcript of hearing of Sept. 29, 1938 filed.

Oct. 25—Brief filed by taxpayer. 10/26/38 copy served.

Nov. 28—Brief filed by General Counsel.

Dec. 29—Motion for leave to file reply brief filed by taxpayer—reply brief lodged.

Dec. 29—Motion granted.

Dec. 29—Copy of motion and reply brief served on General Counsel.

1939

Sept. 6—Opinion rendered—Marion J. Harron, Division 13. Decision will be entered under Rule 50.

Oct. 3—Computation of deficiency filed by General Counsel.

Oct. 5—Hearing set Oct. 25, 1939 on settlement.

Oct. 25—Hearing had before Mr. Arundell on settlement under Rule 50. Referred to Miss Harron for decision.

Oct. 26—Decision entered—Marion J. Harron, Division 13. [1*]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

1940

Jan. 24—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Jan. 24—Proof of service filed by taxpayer.

Feb. 20—Agreed praecipe for record filed with proof of service thereon.

Feb. 20—Notice of filing of praecipe for record filed with proof of service thereon. [2]

United States Board of Tax Appeals

Docket No. 86438

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:E-2 MJ-90D, dated June 15, 1936, and as the basis of his proceeding alleges as follows:

1. That petitioner is an individual residing at 36 Presidio Terrace, San Francisco, California;

2. That the notice of deficiency, a copy of which is hereto attached and marked Exhibit "A", was mailed to the petitioner on June 15, 1936;

3. That the taxes in controversy are income taxes for the calendar year 1933, and the amount involved is $2,170.46. [3]

4. That the determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner has ruled that the sum of $63,226.02 which was a net loss arising from the operation of the petitioner's business is not deductible from the taxable income of petitioner for the year 1933;

(b) The Commissioner has ruled that taxes in the sum of $46.38, which was paid by the petitioner is not deductible from the taxable income of petitioner for the year 1933;

(c) The Commissioner has ruled that a contribution of $24.00 which was made by the petitioner is not deductible from the taxable income of petitioner for the year 1933;

5. That the facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) That petitioner's business now is and was during the calendar years 1932 and 1933, a Trader in Securities on the various Stock and Commodity Exchanges in the United States;

(b) That during the calendar year of 1932, in the natural course of the performance of his business, petitioner sustained a net loss as is more fully

set forth in his Income Tax Return for the calendar year 1932;

(c) That the petitioner brought forward a part of said net loss, to-wit $63,226.02 and set it up in his Income Tax Return for [4] the calendar year 1933 as a proper deduction from his gross income.

(d) That at the time petitioner filed his Income Tax Return for the calendar year 1932, section 117 of the Revenue Act of 1932 was in full force and effect, and under said section, a net loss sustained in a preceding year was allowed as a deduction in computing net income of the tax-payer for the succeeding taxable year;

(e) That thereafter the provisions of said section 117 were supposed to be repealed by section 118(a) of the National Industrial Recovery Act of 1933; That said National Industrial Recovery Act of 1933 has been declared unconstitutional and therefore said section 117 of the Revenue Act of 1932 was and still is in full force and effect when the petitioner filed his Income Tax Return for the calendar year 1933;

(f) That therefore said net loss of $63,226.02 was a proper deduction from the petitioner's gross income for the calendar year 1933 under the Federal Income Tax laws in full force and effect at the time petitioner filed his Income Tax return for the calendar year 1933, and should therefore be allowed by the Commissioner as a deduction as set forth in said Income Tax Return for the calendar year 1933; [5]

(g) That in the performance of the petitioner's business it was necessary for him to use and he did use an automobile; That said gasoline tax in the sum of $46.38 which the petitioner was required to pay on the gasoline used in said automobile was a proper deduction under the laws in effect at that time;

(h) That the petitioner set up in his Income Tax Return for the calendar year 1933 as a proper deduction certain contributions which were actually made by the petitioner and which contributions were made with a view to protect and benefit his business and which contributions were vitally beneficial to him in connection with the success of his business during sad calendar year 1933;

Wherefore, petitioner prays that this Board may hear the proceeding and petitioner prays for relief from the deficiency asserted by the respondent in the full amount of $2,170.46, on the grounds that each and all of said deductions so claimed by the petitioner are proper deductions from the taxable income of said petitioner for the year 1933 and that this Board therefore redetermine the deficiency herein alleged.

ALBERT K. MILLER
Petitioner
36 Presidio Terrace,
San Francisco, California
F. DAVID MANNOCCIR, II,
Attorney for Petitioner,
130 Bush Street,
San Francisco, California. [6]

State of California,
City and County of San Francisco—ss.

Albert K. Miller, being duly sworn, deposes and says:

That he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

ALBERT K. MILLER

Subscribed and sworn to before me this 30th day of July, 1936.

[Seal] MARIE FORMAN

Notary Public in and for the City and County of San Francisco, State of California. [7]

EXHIBIT "A"

IT:AR:E-2
MJ-90D
Mr. Albert K. Miller,
36 Presidio Terrace,
San Francisco, California

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1933 discloses a deficiency of $2,170.46, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:F-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfuly,

GUY T. HELVERING,

Commissioner,

By (signed) CHAS. T. RUSSELL,

Deputy Commissioner.

Enclosures:

Statement

Form 870 [8]

STATEMENT

IT:AR:E-2
MJ-90D

In re: Mr. Albert K. Miller,
36 Presidio Terrace
San Francisco, California

Income Tax Liability
Year—Ended December 31, 1933
Income Tax Liability—$2,170.46
Income Tax Assessed—None
Deficiency—$2,170.46

The deficiency shown herein is based upon the report dated September 24, 1935, prepared by the internal revenue agent A. George Swenson, a copy of which was transmitted to you. The statement of your attorney, Mr. F. David Mannoccir, II, in a letter dated May 8th, 1936, that you do not desire a hearing in Washington is noted.

Computation of the adjusted net income and tax liability follows:

Net Income (Loss) reported in your return		($28,160.02)
Add: (a) 1932 net loss	$63,226.02	
(b) Taxes	46.38	
(c) Contributions	24.00	63,296.40
		$35,136.38
Less:		
Dividends	$32,777.85	
Personal Exemption	2,500.00	25,136.85
Balance subject to normal tax		None
Normal tax due		None
Surtax on $35,136.38		$ 2,170.46
Total tax liability adjusted		$ 2,170.46
Tax Assessed		None
Deficiency		$ 2,170.46

Explanation of Items Changes

(a) You claimed a deduction in the amount of $63,226.02 as a net loss brought forward from the year 1932 from the operation of your business as a trader in securities. You claimed the loss under the provisions of section 117 of the Revenue Act of 1932. [9]

You are advised that section 117 of the Revenue Act of 1932 was repealed by section 118(a) of the National Industry Recovery Act of 1933. The deduction has, therefore, been disallowed.

(b) You claimed a deduction of $46.38 representing gasoline and sales taxes. You are advised that such taxes are not deductible by the consumer since, under the laws of the State of California the taxes are imposed upon the dealer or manufacturer. The deduction has accordingly been disallowed.

(c) Contributions to the California State Automobile Association and the San Francisco Junior Chamber of Commerce have been disallowed as not coming within the provisions of section 23(n) of the Revenue Act of 1932.

A copy of this letter has been mailed to your representative, Mr. F. David Mannoccir, II, 130 Bush Street, San Francisco, California, in accordance with the power of attorney executed by you and on file in this office.

MJ/CA-1

[Endorsed]: U. S. B. T. A. Filed Sept. 5, 1936.

[10]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1-2-3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (a)-(c) Denies that in determining the deficiency asserted herein the Commissioner committed the errors alleged in subparagraphs (a) to (c), inclusive, of paragraph 4 of the petition.

5. (a)-(h) Denies each and every material allegation of fact contained in subparagraphs (a) to (h), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(signed) HERMAN OLIPHANT
General Counsel
for the
Department of the Treasury

Of Counsel:
DE WITT M. EVANS,
WILFORD H. PAYNE,
Special Attorneys,
Bureau of Internal Revenue.

WHP/CFB 10/27/36

[Endorsed]: U. S. B. T. A. Filed Oct. 28, 1936.

[11]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, that the following facts shall be taken to be true and received as evidence in the above-named proceeding:

1. The petitioner is an individual residing at 36 Presidio Terrace, San Francisco, California.

2. Petitioner duly filed his income tax return for the calendar year 1933 with the Collector of Internal Revenue at San Francisco, California. On said return he claimed a deduction under Section 117 of the Revenue Act of 1932 in the amount of $63,426.02, as a net loss brought forward from the calendar year 1932. Deductions were taken on said return for sales taxes in the amount of $46.38 and contributions in the amount of $159.00.

3. In arriving at the deficiency involved in this proceeding the Commissioner disallowed as a deduction the aforesaid net loss carried forward from the year 1932. The amount disallowed by the Commissioner was $63,226.02 instead of the full amount of $63,426.02 claimed by the petitioner on his return. [12] The Commissioner also disallowed a deduction for taxes in the amount of $46.38 and contributions in the amount of $24.00. The petitioner concedes the correctness of the Commissioner's action in disallowing said amounts claimed as deductions for taxes and contributions. The aforesaid disallowance by the Commissioner of the net loss claimed

under Section 117 of the Revenue Act of 1932 was based on the ground that said Section had been repealed by Section 218(a) of the National Industrial Recovery Act, 48 Stat. 208. The statement attached to the Notice of Deficiency, a copy of which is attached to the petition filed in this proceeding, erroneously refers to said Section 218(a) of the National Industrial Recovery Act as Section 118(a) of said Act.

4. During the calendar years 1932 and 1933 the petitioner was engaged in business as a trader in securities listed on various stock exchanges in the United States.

5. During the calendar year 1932 the petitioner sustained a net loss attributable to the operation of his business, in the amount of $63,426.02, which petitioner brought forward and claimed as a deduction from gross income in his income tax return filed for the calendar year 1933.

6. If Section 117 of the Revenue Act of 1932 was repealed by Section 218(a) of the National Industrial Recovery Act, the deduction taken by petitioner in his 1933 income tax return in the amount of $63,426.02 should be disallowed. Claim is made by the respondent for the increased deficiency which would [13] result from the disallowance of said amount instead of the amount of $63,-226.02 disallowed by the Commissioner in arriving at the deficiency involved in this proceeding.

7. Petitioner contends that Section 117 of the Revenue Act of 1932 was not repealed by Section

218(a) of the National Industrial Recovery Act on the ground that said Act and said Section 218(a) are unconstitutional. If said Section 117 was not so repealed then the petitioner is entitled to said deduction of $63,426.02.

F. DAVID MANNOCCIR, II
Counsel for Petitioner
(sgd) J. P. WENCHEL
Chief Counsel, 9/29/38
Bureau of Internal Revenue,
Counsel for Respondent.

HRH:emb 9-29-38

[Endorsed]: U. S. B. T. A. Filed at hearing. Sept. 29, 1938. [14]

[Title of Board and Cause.]

Docket No. 86438.

Promulgated September 6, 1939.

Section 218 (a) of the National Industrial Recovery Act, which repealed section 117 of the Revenue Act of 1932 as of January 1, 1933, is not unconstitutional, and hence a statutory net loss sustained in 1932 is not deductible in 1933.

F. David Mannoccir, II, Esq., for the petitioner.
Harry R. Horrow, Esq., for the respondent.

OPINION

Harron: The respondent determined a deficiency in income tax for the year 1933 in the amount of

$2,170.46. The deficiency results from respondent's disallowance of certain minor deductions and of net loss, carried over from 1932, in the amount of $63,-226.02. The petitioner concedes the correctness of the adjustments made, except the disallowance of the net loss deduction.

The facts were stipulated and, in so far as material, are as follows:

(1) The petitioner is a resident of San Francisco, California. Petitioner filed his income tax return for the year 1933 with the collector at San Francisco. During the calendar years 1932 and 1933, petitioner was engaged in business as a trader in securities listed on various stock exchanges in the United States.

(2) During the calendar year 1932 the petitioner sustained a net loss, attributable to the operation of his business, in the amount of $63,426.02, which he brought forward and claimed as a deduction from gross income in his income tax return filed for the year 1933 under section 117 of the Revenue Act of 1932. The respondent, in determining the deficiency, disallowed the amount of $63,-226.02 instead of the full amount claimed by the petitioner on his return.

(3) Claim is made by the respondent for the increased deficiency in tax which would result from the disallowance of the full amount of $63,426.02 instead of $63,226.02. [15]

The respondent disallowed the deduction on the

ground that, since section 117 of the Revenue Act of 1932 had been specifically repealed by section 218 (a) of the National Industrial Recovery Act, effective as of January 1, 1933, petitioner could not deduct in 1933 net loss brought forward from 1932.

The petitioner contends that section 218 (a) of the Recovery Act is unconstitutional and that, consequently, section 117 of the Revenue Act of 1932 was not repealed, and that therefore the statutory net loss sustained in 1932 is deductible in 1933.

Section 117 of the 1932 Act allowed deduction of a net loss sustained in a preceding year, to be taken in computing the net income for the succeeding taxable year. By section 218 (a) of the Recovery Act,[1] the Congress repealed section 117 of the 1932 Act, effective January 1, 1933. The Congress repealed, outright, the provisions of section 117, and did not delegate any authority or power to any officer of the Government to effect the repeal. The Congress revoked a privilege it had given previously. This was within the legislative power of Congress. The allowance of deductions from gross income for the purpose of determining taxable income is a matter of "legislative grace." New Colonial Ice Co. v. Helvering, 292 U. S. 435; Helvering v. Independent Life Insurance Co., 292 U. S. 371.

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[1][National Industrial Recovery Act, Title II, Public Works and Construction Projects, Reemployment and Relief Taxes.]

Sec. 218. (a) Effective as of January 1, 1933, sections 117, 23 (i), 169, 187, and 205 of the Revenue Act of 1932 are repealed.

The Recovery Act was approved June 16, 1933. It thus appears that the period of retroactivity involved in the enactment of the repeal provision was very short. It is well settled that retroactivity in income tax statutes is consistent with the due process of law clause of the Fifth Amendment. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1; United States v. Hudson, 299 U. S. 498; Fesler v. Commissioner, 38 Fed. (2d) 155; Phipps v. Bowers, 49 Fed. (2d) 996; certiorari denied, 284 U. S. 641; Edgar Stanton et al., Executors, 34 B. T. A. 451; affd., 98 Fed. (2d) 739; Chester A. Souther, 39 B. T. A. 197, 219. The cases of Nichols v. Coolidge, 274 U. S. 531; Untermeyer v. Anderson, 276 U. S. 440; and Milliken v. United States, 283 U. S. 15, cited by the petitioner, are not applicable, no income tax statutes being involved in any of those cases.

The petitioner also contends that since Title I of the Recovery Act was declared invalid by the Supreme Court by its decision in Schechter Poultry Corporation v. United States, 295 U. S. 495, all other titles and provisions of the Recovery Act are invalid. As far as we know it has never been contended that Title II of the Recovery Act is [16] unconstitutional. See Allied Agents, Inc. v. United States, 26 Fed. Supp. 98, 104.

The general authorization to the President, contained in section 209 of Title II, to make necessary rules and regulations clearly has no application to section 218 (a), which directly repealed section 117 of the 1932 Revenue Act.

Further, there is a separability clause in the Recovery Act, section 303, and the effect of this clause is to create a presumption in favor of separability. Carter v. Carter Coal Co., 298 U. S. 238, 312. Petitioner has failed to show that the provisions of Title II of the Recovery Act, particularly section 218 (a), are not separable from the provisions of Title I thereof. "A provision within the legislative power may be allowed to stand if it is separable from the bad." Lynch v. United States, 292 U. S. 571, 586.

Other sections of Title II of the Recovery Act have been held constitutional. See A. J. Crowhurst & Sons, Inc., 38 B. T. A. 1072, involving section 215 (d) and (f) of the Recovery Act; W. & K. Holding Corporation, 38 B. T. A. 830, involving section 216 (a); Allied Agents, Inc. v. United States, supra, involving sections 215, 216. See also Cereal Products Refining Corporation, 39 B. T. A. 92, where it was held that a taxpayer obtained new rights in the matter of filing separate income tax returns by reason of the enactment of new revenue provisions enacted in section 218 (e) of the Recovery Act, and where it is pointed out also that as a matter of reality a new revenue act was enacted by Congress in 1933 by virtue of the enactment of the various revenue provisions, some new and some amendatory, in the Recovery Act. Petitioner's argument would have little merit if the repeal of section 117 of the Revenue Act of 1932 had been made in a separate revenue act, and it has scarcely more merit, if any, as the matter

stands because of the separability of the revenue provisions of the Recovery Act from other provisions thereof.

It is our opinion that section 218 (a) of the Recovery Act is valid, not violating any provisions of the Constitution of the United States as far as this record shows. It is held that respondent properly disallowed deduction in 1933 of the statutory net loss sustained in 1932.

Recomputation of the deficiency is necessary. Disallowance of the full amount of the net loss deduction, as taken on the return, will result in increase of the deficiency.

Decision will be entered under Rule 50. [17]

United States Board of Tax Appeals

Docket No. 86438

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Opinion promulgated on September 6, 1939, in the above-entitled proceeding, the respondent herein having filed on October 3, 1939 a proposed recomputation of deficiency under Rule

50, and counsel for petitioner having made no objection thereto; now, therefore, it is

Ordered and decided: That there is a deficiency in tax in the amount of $2,202.80 for the year 1933.

[Seal] (s) MARION J. HARRON
Member

Entered Oct. 26, 1939. [18]

[Title of Board and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

Jurisdiction

Albert K. Miller, your Petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals in case bearing Docket No. 86438, entered on October 25, 1939, by which decision the United States Board of Tax Appeals found and determined that there is a deficiency in income tax due from your Petitioner in the amount of $2,202.80 for the calendar year 1933. [19]

Your Petitioner, at the time of filing this Petition, is a resident of the State of California.

The return of income tax, in respect to which the

aforementioned tax liability arose, was filed by your Petitioner with the Collector of Internal Revenue for the First Collection District of California, located in the City and County of San Francisco, State of California, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Jurisdiction of the Circuit Court of Appeals for the Ninth Circuit to review the decision of the United States Board of Tax Appeals, aforesaid, is founded on Section 1001—3 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, Section 1101 of the Revenue Act of 1932 and Section 519 of the Revenue Act of 1934.

II.

Prior Proceedings

On June 15, 1936, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1933 in the amount of $2,170.46 and sent the taxpayer, by registered mail, a notice of deficiency in accordance with the provisions of Section 272(a) of the Revenue Act of 1932 as amended by Section 501 of the Revenue Act of 1934. Thereafter, and on September 5, 1936, the taxpayer filed an appeal [20] in the form of a petition from the said determination of the Commissioner with the United States Board of Tax Appeals. The case was duly tried to the United States Board of Tax Appeals on September 29, 1938, and on September 6, 1939, the Board promulgated its opinion (40

B. T. A.—No. 79), pursuant to which opinion it entered its decision on October 25, 1939, wherein and whereby it was ordered and decided that there is a deficiency in tax in the amount of $2,202.80 for the year 1933.

III.

Nature of Controversy

Petitioner is an individual residing at 36 Presidio Terrace, San Francisco, California. That during the calendar years 1932 and 1933 the Petitioner was engaged in the business as a trader in securities listed on the various stock exchanges of the United States. That during the calendar year 1932 the Petitioner sustained a net loss attributable to the operation of his business, in the amount of $63,-426.02. That Petitioner duly filed his income tax return for the calendar year 1933 with the Collector of Internal Revenue at San Francisco, California. On said return he claimed a deduction under Section 117 of the Revenue Act of 1932 in the amount of $63,426.02, as a net loss brought forward from the calendar year 1932. That the Commissioner disallowed as a deduction the aforesaid [21] net loss of $63,426.02 carried forward from the year 1932 and based said disallowance on the grounds that said Section 117 of the Revenue Act of 1932 had been repealed by Section 218 (a) of the National Industrial Recovery Act, 48 Stat. 208.

The Petitioner contends that said deduction was proper and should have been allowed, that Section 117 of the Revenue Act of 1932 was not repealed by

Section 218 (a) of the National Industrial Recovery Act, 46 Stat. 208, that said National Industrial Recovery Act is unconstitutional and that Section 218 (a) of said National Industrial Recovery Act is unconstitutional.

A hearing was had before the Board of Tax Appeals on September 29, 1938. Its decision was promulgated and its order was entered on October 25, 1939, fixing the deficiency in taxes as $2,202.80 and holding that the Respondent properly disallowed the deduction in 1933 of the statutory net loss sustained in 1932, amounting to said sum of $63,426.02. Exception is taken to that decision.

IV.

Assignment of Errors

In making its decision, as aforesaid, the United States Board of Tax Appeals made the following errors, upon which your Petitioner relies as the basis of this proceeding.

1. The Board of Tax Appeals erred in holding that the Commissioner of Internal Revenue was correct in disallow- [22] ing the deduction in 1933 of the statutory net loss sustained in 1932 in the sum of $63,426.02.

2. The Board of Tax Appeals erred in holding that Section 218 (a) of the National Industrial Recovery Act, 46 Stat. 208, is valid, not violating any provisions of the Constitution of the United States.

3. The Board of Tax Appeals erred in holding that Section 117 of the Revenue Act of 1932 has been repealed.

4. The Board of Tax Appeals erred in holding that there was a deficiency tax in the amount of $2,202.80 due from the Petitioner for the calendar year 1933.

5. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

Wherefore, your Petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and rules of said Court, and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that errors committed by the Board of Tax Appeals and complained of may be reviewed and corrected by said Court.

F. DAVID MANNOCCIR, II.
Attorney for Petitioner [23]

State of California,
City and County of San Francisco—ss.

F. David Mannoccir, II., being duly sworn, deposes and says:

That he is an attorney-at-law and the attorney for the Petitioner in this proceeding, and as such is duly authorized to verify the foregoing Petition for review to the United States Circuit Court of Appeals for the Ninth Circuit; that he has read said Petition and is familiar with the contents thereof; that said Petition is true of his own knowl-

edge except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true.

F. DAVID MANNOCCIR, II.

Subscribed and sworn to before me this 22nd day of January, 1940.

[Seal] ANNE F. SWIFT

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires:

[Endorsed]: U. S. B. T. A. Filed Jan. 24, 1940. [24]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Commissioner of Internal Revenue
Internal Revenue Building
Washington, D. C.
and
J. P. Wenchel, Esq.,
Chief Counsel, Bureau of Internal Revenue
Internal Revenue Building
Washington, D. C.

You, and each of you, are hereby notified that the Petitioner did, on the 24th day of January, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Petition for Review by the United States Circuit Court of

Appeals for the Ninth Circuit of the decision [25] of the Board heretofore rendered in the above entitled case. A copy of the Petition for Review as filed is hereto attached and served upon you.

Dated: This 23rd day of January, 1940.

F. DAVID MANNOCCIR, II.
Attorney for Petitioner
225 Financial Center Bldg.,
405 Montgomery Street
San Francisco, California.

Personal service of the above and foregoing notice, together with a copy of the Petition for Review mentioned therein, is hereby acknowledged this 24th day of January, 1940.

(sg) J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed Jan. 24, 1940. [26]

[Title of Board and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within forty (40) days from the date of filing of the petition for review in the above entitled proceedings, transmit to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, copies, duly certified as correct, of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit heretofore filed by the above named Petitioner:

1. The docket entries of the proceedings before the United States Board of Tax Appeals.
2. Petition filed on September 5, 1936.
3. Answer filed on October 28, 1936.
4. Stipulation of facts.
5. Opinion of the Board, [27] promulgated September 6, 1939.
6. Decision of the Board entered October 25, 1939.
7. Petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, filed January 24, 1940.
8. Notice of filing petition for review, filed January 24, 1940.
9. This Praecipe for Record.
10. Notice of filing this Praecipe and the admission of service thereof.

Said Transcript to be prepared as required by law and rules of the United States Circuit Court of Appeals for the Ninth Circuit.

F. DAVID MANNOCCIR, II.
Attorney for Petitioner
405 Montgomery Street,
San Francisco, California.

Service of a copy of this Praecipe is hereby admitted this 20th day of February, 1940, Agreed to.

J. P. WENCHEL
Chief Counsel
Bureau of Internal Revenue
Counsel for Respondent

[Endorsed]: U. S. B. T. A. Filed Feb. 20, 1940.

[28]

[Title of Board and Cause.]

NOTICE OF FILING OF PRAECIPE

To: Commissioner of Internal Revenue
Internal Revenue Building,
Washington, D. C.
and
J. P. Wenchel, Esq.,
Chief Counsel, Bureau of Internal Revenue
Washington, D. C.

You, and each of you, will please take notice that on the 20th day of February, 1940, the undersigned, attorney for Petitioner in the above entitled proceedings, has filed with the Clerk of the United States Board of Tax Appeals a Praecipe for Record, a copy of which is annexed hereto.

Dated: This 17th day of February, 1940.

F. DAVID MANNOCCIR, II.
Attorney for Petitioner
405 Montgomery Street
San Francisco, California.

[29]

Receipt of the foregoing Notice of Filing the Praecipe for Record and service of a copy of the Praecipe herein mentioned is acknowledged this 20th day of February, 1940.

J. P. WENCHEL
Chief Counsel
Bureau of Internal Revenue
Counsel for Respondent

[Endorsed]: U. S. B. T. A. Filed Feb. 20, 1940.

[30]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 30, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 21st day of February, 1940.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 9463. United States Circuit Court of Appeals for the Ninth Circuit. Albert K. Miller, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed March 6, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9463

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S STATEMENT OF POINTS TO BE RELIED UPON

To Paul P. O'Brien, Clerk of the above entitled Court:

The Petitioner, Albert K. Miller, submits herewith a Statement of the Points on which he intends to rely on his appeal to the United States Circuit

Court of Appeals for the Ninth Circuit from the decision of the United States Board of Tax Appeals in the above entitled case; as required by Paragraph 6 of Rule 19 of the said Circuit Court of Appeals:

1. Each and all of the points as set forth in the Assignment of Errors incorporated in the Petitioner's Petition for Review filed with the United States Board of Tax Appeals.

2. The Board of Tax Appeals erred in holding that Section 218 (a) of the National Industrial Recovery Act, 46 Stat. 208, is applicable to the calendar year 1933 and to the Income Tax Return filed for said calendar year.

Dated: March 15, 1940.

F. DAVID MANNOCCIR, II.
Attorney for Petitioner
405-Montgomery Street
San Francisco, California

[Endorsed]: Filed Mar. 15, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF RECORD TO BE PRINTED

To Paul P. O'Brien, Clerk of the above entitled Court:

The Petitioner, Albert K. Miller, designates for printing the entire transcript of record heretofore

filed in this case and certified to you by the Clerk of the United States Board of Tax Appeals.

Dated: This 15th day of March, 1940.

F. DAVID MANNOCCIR, II.
Attorney of Petitioner
405-Montgomery Street
San Francisco, California

[Endorsed]: Filed Mar. 15, 1940, Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,
City and County of San Francisco—ss.

Bernice Fross, being first duly sworn, deposes and says: That affiant is a citizen of the United States of America and a resident of the City and County of San Francisco; that affiant is over the age of eighteen (18) years and is not a party to the within and above entitled action; that affiant's business address is 405-Montgomery Street, San Francisco, California; that on the 15th day of March, 1940, affiant served the within Designation of Record to be Printed and Statement of the Points Upon Which Petitioner Relies on Appeal on the Respondent in said action, by placing a true copy thereof in an envelope addressed to the attor-

ney of record for said Respondent at the office address of said attorney as follows:

J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue
Internal Revenue Building
Washington, D. C.

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at San Francisco, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

BERNICE FROSS

Subscribed and sworn to before me this 15th day of March, 1940.

[Seal] ANNE F. SWIFT

Notary Public in and for the City and County of San Francisco, State of California.

No. 9463

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the United States Board of Tax Appeals

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, November 6, 1940.

Before: Wilbur, Garrecht and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered petition to review herein argued by Mr. F. David Mannoccir, II, counsel for petitioner, and by Mr. Michael H. Cardoza, IV, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, November 13, 1940.

Before: Wilbur, Garrecht and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in

above *court,* be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

OPINION

Before: Wilbur, Garrecht and Healy, Circuit Judges

Healy, Circuit Judge.

The case is here on petition to review a decision of the Board of Tax Appeals upholding the determination of a deficiency in petitioner's income tax for 1933.

During the calendar years 1932 and 1933 petitioner was engaged in business as a trader in securities. In 1932 he sustained a net loss in his business operations. He carried the loss forward and claimed it as a deduction from gross income in his return for the calendar year 1933, under §117 of the Revenue Act of 1932. This provides that "if, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year * * *."[1]

The Commissioner disallowed the deduction on the ground that §117 of the Revenue Act of 1932 had been repealed by §218 (a) of the National Industrial Recovery Act, enacted June 16, 1933. Accordingly he assessed a deficiency.

The case requires little discussion. Title II of the National Industrial Recovery Act, §218 (a), under a subhead denominated "Employment and Relief Taxes", provides: "Effective as of January 1, 1933, Sections 117, [and other designated sections] of the Revenue Act of 1932 are repealed." Petitioner argues that the attempted repeal was ineffectual, since it was held in Schechter Poultry Corp. v. United States, 295 U. S. 495, that the National Industrial Recovery Act is unconstitutional.

The argument is without merit. The repealing section did not relate to or depend upon the codes of fair competition involved in the Schechter decision. The National Industrial Recovery Act contains a separability clause (§303). The various revenue provisions of Title II have been administered ever since the act was passed, and no reason even faintly persuasive is advanced in support of their supposed unconstitutionality.

It is further claimed that the repealing section is invalid because retroactive to January first of the year enacted. This contention is equally groundless. As said in United States v. Hudson, 299 U. S.

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[1]The provision is contained in subsec. (b). Subsec. (a) defines the term "net loss".

498, "as respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this court have recognized this practice and sustained it...." The provision contained in the Revenue Act of 1932, permitting the carrying forward of a net loss, was a matter of legislative grace. It was within the power of Congress to revoke the privilege.

Petitioner's remaining point is that §218 (a), properly construed, was not intended to apply to a deduction carried over from 1932, but was intended to effect only carry-overs in years subsequent to the year of its enactment. However, §117 was simply repealed outright. Throughout 1933 and when petitioner made his return for that year there was no statute on the books permitting the taking of a deduction for a net loss sustained the previous year.

Affirmed.

(Endorsed:) Opinion. Filed Nov. 13, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9463

ALBERT K. MILLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals,

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered November 13, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-one (41) pages, numbered from and including 1 to and including 41, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of January, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk